IN THE HIGH COURT OF SINDH, KARACHI

CRIMINAL APPEAL NO. 152 OF 2013

Present:

Mr. Justice Mohammad Kareem Khan Agha
Justice Mrs. Kausar Sultana Hussain

For Applicants.	:	Mr. Khaleeq Ahmed, Advocate.
For Complainant.	:	Mr.Syed Asghar Ali, Advocate.
For Respondent.	:	Mr. Ghulam Mohiuddin, A.A.G.
Date of hearing.	:	24.11.2020
Date of Judgment	:	30.11.2020

JUDGMENT

KAUSAR SULTANA HUSSAIN, J: This Criminal Appeal No. 152 of 2013, under sub-section (7) of Section 10 of Ordinance IX of 1984, (Special Courts Offences in respect of Banks) is directed against the judgment dated 26.04.2013, passed by the learned Presiding Officer, Special Court (Offences in Banks) Sindh, at Karachi in Special Case No. 36 of 2009 , in FIR No. 20 of 2009, FIA / CBC-1, Karachi, under Sections 409, 477-A PPC Read With Section 5(2) of PCA-II of 1947, whereby the learned trial court after full dressed trial, convicted and sentenced the appellant to suffer R.I. for seven years with fine of Rs.18,43,049/- and in default in payment of fine, it was further ordered that appellant shall suffer S.I. for twenty one months. However, benefit of Section 382-B, Cr.P.C. was also extended to the appellant.

2. The brief facts of the prosecution case are that on the complaint of cluster Manager Osama Mansoor, NIB Bank, Tariq Road Branch, Karachi, the FIR was lodged against their teller Humayoon Mirza alleging to have misappropriated and embezzled an amount of Rs.9,89,246/-, which was received by accused on different dates in two current accounts having title of M/s. Dollar Impax and M/s Bilal Stores. The application was submitted by Muhammad Saleem proprietor of aforesaid two firms. He also produced the deposit slips bearing the seal of bank and signature of accused but the amount was not posted in the respective accounts and same was taken by accused for his personal use fraudulently and he

destroyed the deposit slips of banks part to hide the evidence. Hence this FIR was lodged.

3. After usual investigation the matter was challaned and sent up for trial. The charge was framed against the appellant by the trial court to which he pleaded not guilty and claimed trial

4. In order to prove its case, the prosecution examined 9 PWs and exhibited numerous documents. The appellant recorded his statement under Section 342 Cr.P.C., whereby he denied the allegation leveled against him. He did not examine himself on oath or call any DW in support of his defence case.

5. After assessing the evidence before it the learned trial court convicted and sentenced the appellant by the impugned judgment as earlier mentioned in this judgment. Hence the appellant has filed this appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. At this point it is pertinent to note that the appellant as per jail roll has already served over 7 years of his sentence although he is now on bail pending the decision in his appeal against conviction.

8. After the reading out of the evidence and the impugned judgment learned counsel for the appellant candidly conceded that the prosecution had proved the charge against the appellant beyond a reasonable doubt and the appellant on instructions present in court did not want to argue the appeal on merits but instead only requested a reasonable reduction in sentence on the grounds that (a) he had served a most of his sentence (b) that he had a family to support for which he was the sole bread winner (c) that he suffered ill health (d) that he had already suffered through the loss of his job (e) that the appellant showed remorse for his actions by deciding not to contest the appeal and (e) the appellant had used his time productively in jail in activities which could contribute towards his reformation.

9. Learned AAG and learned counsel for the complainant based on the mitigating circumstances put forward by the appellant raised no objection to a reduction in sentence.

10. Having gone through the evidence on record and the impugned judgment we are of the view that the prosecution has proved its case against the appellant beyond a reasonable doubt in respect of the offence for which he was charged based on both oral and documentary evidence which includes his signature on over 40 of the deposit slips and a comparison of his signature by the hand writing expert. All the PW's were also consistent in their evidence and made no material contractions and had no enmity with the appellant and as such had no reason to falsely implicate him in this case and thus the only issue before us is one of sentencing.

11. We note that sentencing is at the discretion of the court and is not a mechanical exercise. In exercising its discretion the court should consider numerous factors such as the minimum and maximum sentence which can be imposed on conviction, the role of the accused, the gravity of the offence, the amount of loss caused, whether the accused shows any kind of remorse, whether the accused is capable of reformation, the age of the appellant, the health of the appellant, his conduct in jail and how long he has already spent in jail etc. In this respect reliance is placed on **Muhammed Juman V State** (2018 SCMR 318) which held as under at P322;

> *"Inflicting conviction and imposing sentence is not a mechanical exercise but it is onerous responsibility to inflict, fair, reasonable and adequate sentence, commensurate with gravity and or severity of crime, looking at the motive, attending and or mitigating circumstances that provoked or instigated commission of crime and it involves conscious application of mind. No mathematical formula, standard or yard stick could be prescribed or set out to inflict conviction and sentence, such factors vary from case to case and while undertaking such exercise Court must keep in light provisions contained in Chapters-III and IV of the P.P.C. Unfortunately, no sentencing guideline is laid down in Pakistan, though Courts have set out certain parameters in many cases as to what is mitigating and or aggravating circumstances that may warrant alteration and or varying in conviction and or sentence within the parameters provided under the charging or penal provision".*

12. We find the mitigating factors made out by the appellant do justify a reduction in sentence especially keeping in view the fact that the appellant has already served out over 7 years of his sentence and he was sentenced to 7 years imprisonment and a further 21 months in default of

payment of his fine which he has so far not paid and the relatively minor amount of loss caused being only approximately RS 18 lacs.

13. Thus, whilst taking into consideration the arguments/mitigating factors justifying a reduction in sentence of the appellant we hereby by exercising our judicial discretion under S.423 Cr.PC maintain the appellant's conviction but modify the sentence to the appellant and reduce the sentence of seven years to six years. Further we are of the view that ends of justice would be met, if we order that in default of payment of fine, the appellant is directed to undergo ONE YEAR imprisonment. Since the appellant has already served seven years in jail, we are of the view that as per the modified period of sentence in respect of default in payment of fine, there is no need for him to remand him back in prison. The appellant is on bail, his bail bonds stands cancelled and surety is discharged, **however it is made clear that he will still be liable to pay the fine imposed on him under the impugned judgment** by virtue of provision of Section 70 PPC, which provides that the fine or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence / and if, under the sentence, the offender be liable to imprisonment for a longer period than six years than at any time previous to the expiration of that period, and the death of the offender does not discharge from the liability any property, which would after his death, be legally liable for his debts. In this respect reliance is placed on **Ahmed Ali Siddiqui V. Sargodha Central Cooperative Bank Limited** (1989 SCMR, 824) case the Hon'ble Supreme Court held as under;

> *"a sentence of imprisonment in default of payment of fine is not a substitute for payment of fine but as a matter of fact, the said sentence of imprisonment is a punishment for non-payment of fine, even if such sentence of imprisonment in default of payment of fine is under gone by a convict the amount of fine is still to be recovered from him".*

14. The appeal and listed applications stand dismissed **except** as modified above in terms of sentencing.

JUDGE

JUDGE

Faheem/P.A